Supreme Court, U.S.
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No. 05-

IN THE

Supreme Court of the United States

EDWARD A. SHAW,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, in limiting the scope of a federal agency's authority in criminal matters, nonetheless intended for 18 U.S.C. § 1001 to be an alternate vehicle for criminal prosecution, notwithstanding *United States v. Rodgers*.

2. Whether fair warning under the due process clause is violated when a legal duty under 18 U.S.C. § 1001 is created by virtue of completing a form rather than by statute or regulation.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	vi
Opinion Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	2
Reasons for Granting the Petition	6
Conclusion	12

TABLE OF CITED AUTHORITIES

Page

Cases:

Buckley v. Valeo 424 U.S. 1, 96 S. Ct. 612 (1976) ... 9

Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) 2

Kolender v. Lawson, 461 U.S. 352, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983) 9

Train v. Natural Resources Defense Council, Inc., 421 U.S. 60, 95 S. Ct. 1470, 43 L. Ed. 2d 731 (1975) 2, 7

United States v. Anzalone, 76 F.2d 676 (1st Cir. 1985) 10

United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808, 98 L.Ed. 989 (1954) 9

United States v. Irwin, 654 F.2d 671 (10th Cir. 1981) 11

United States v. Kingston, 971 F.2d 481 (10th Cir. 1992) 11

United States v. Larson, 796 F.2d 244 (8th Cir. 1986) 10

Cited Authorities

Page

United States v. Rodgers, 466 U.S. 475, 104 S. Ct. 1942, 80 L. Ed. 2d 492 (1984) 6, 7, 9

United States v. Tobon-Builes, 706 F.2d 1092 (C.A. Fla. 1983) 11

Constitutional Provisions:

Fifth Amendment 1

Statutes and Regulations:

18 U.S.C. § 2 ..... 1, 5

42 U.S.C. § 9603 5

18 U.S.C. § 1001 ..... *passim*

40 C.F.R. § 61.140-61.156 2-3

40 C.F.R. § 61.145. 5

42 U.S.C. § 1857 7

42 U.S.C. § 7412 2

42 U.S.C. § 7413 ..... 2, 3, 5, 8

42 U.S.C. §§ 7401-7642 2

K.S.A. § 65-3001 2

28 U.S.C. § 1254(1) 1

Cited Authorities

Page

Other Authority:

Note, Clean Air Act Amendments of 1970: A Congressional Cosmetic, 61 Geo. L.J. 153 (1972) 8

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Tenth Circuit Filed October 13, 2005 ..... 1a

Appendix B — Order Of The United States Court Of Appeals For The Tenth Circuit Denying Petition For Rehearing Filed November 21, 2005 ..... 45a

Appendix C — Relevant Statute 47a

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit, Case Numbers 01-3344 and 01-3310 is unreported. It can be found online at 2005 WL 2563072 (10th Cir. (Kan.)). It is reproduced at App. 1a-44a..

STATEMENT OF JURISDICTION

The Tenth Circuit entered its Opinion affirming Mr. Shaw's conviction on October 13, 2005. A petition for rehearing was denied on November 21, 2005 and is reproduced at App. 46a-47a. An application extending the deadline to file a petition for a writ of certiorari was granted by Justice Breyer and the time period for filing a petition for writ of certiorari extended to March 21, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "[N]or shall any person be . . . deprived of life, liberty, or property, without due process of law".

18 U.S.C. § 1001 provides in relevant part

> (a) . . . in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious,

> or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

42 U.S.C. § 7413 is reproduced at App. 47a-68a.

STATEMENT OF THE CASE

1. The Clean Air Act is found at 42 U.S.C. § § 7401-7642. These statutes were enacted to encourage and to assist the States in curtailing air pollution. *See generally Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 63-64, 95 S. Ct. 1470, 1474-75, 43 L. Ed. 2d 731 (1975). The Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676, "sharply increased federal authority and responsibility in the continuing effort to combat air pollution," 421 U.S., at 64, 95 S. Ct. at 1474, but continued to assign "primary responsibility for assuring air quality" to the several States. *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 845, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). In Kansas, the Department of Health and Environment (KDHE) has that responsibility under the Kansas Air Quality Act. K.S.A. § 65-3001, *et seq.*

The Clean Air Act sets the parameters of Environmental Protection Agency authority regarding air pollutants such as asbestos. It has the authority to promulgate regulations and standards controlling the release of asbestos pursuant to 42 U.S.C. § § 7412(b) and (e). Those regulations are found in 40 C.F.R. Subpart M which establishes the National Emission Standard for Asbestos. *See* 40 C.F.R. § 61.140-

61.156. Federal enforcement of those regulations and standards is contained in 42 U.S.C. § 7413. Under 42 U.S.C. § 7413(a), Congress delineated when the EPA could enforce the laws and regulations in administrative, civil or criminal contexts. With respect to criminal enforcement, 42 U.S.C. § 7413(a)(3) authorizes prosecutions only in accordance with subsection (c) of section 7413.

Under 18 U.S.C. § 1001, any person who

> (a) . . . in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

2. Petitioner Edward Shaw is a professional engineer who owned and operated ESCM & Associates Inc. (ESCM), an engineering and environmental consulting firm. App. 3a. In 1993, one of Petitioner's clients, EZ Serve contacted him about Shallow Water Refinery, an abandoned oil refinery located near Scott City, Kansas which it wished to have demolished. Shaw assisted with the bidding process. App. 3a. At EZ Serve's request, Petitioner agreed to purchase the property from EZ Serve and immediately turn around and sell it to Southwest Wrecking, a metal salvage company owned by Jean and Carl Stifler. App. 4a-5a. This occurred in August 1993. App. 6a.

After purchasing the property, the Stiflers began demolition and salvage work. App. 6a. In November 1993, a representative from KDHE attempted to inspect the refinery but was denied access by Jean Stifler. App. 6a-7a. Subsequently KDHE discovered that no Notification of Demolition and Renovation form had been filed for the refinery. App. 7a. Petitioner had received training in asbestos abatement a month prior. App. 8a. Jean Stifler requested that Petitioner come to the property to do an asbestos inspection and submit a Notification of Demolition and Renovation form. App. 8a. The refinery was divided into three areas, A, B, C. Petitioner inspected what he believed to be Area A and in completing the form, indicated there was no insulation to test but asserted if unexpected asbestos or suspected asbestos was encountered, all work would stop. App. 9a. Petitioner submitted the form to the EPA signed by Edward A. Shaw, Agent for S.W. Wrecking. App. 9a.

In March 1993 Petitioner returned to the refinery to take samples. Testing revealed the presence of asbestos in areas B and C but not A. App. 12a. Based on these results, Petitioner prepared a revised Notification of Demolition and Renovation form which was signed by C.L. Stiffler. It was submitted on June 17, 1994. App. 13a.

In December 1996, an agent with the EPA inspected the property and issued a cease and desist order to the Stifflers, requiring them to cease all demolition activity at Shallow Water. App. 16a. In May 1997, a representative from KDHE returned to the property and subsequently issued an order citing the Stifflers with various violations of State law. App. 17a. In August 1997, several representatives of KDHE met with the Stifflers concerning these violations. Petitioner was present and did much of the talking on behalf of the Stifflers. App. 18a.

Ultimately, an indictment was filed June 15, 1999 against Petitioner and the Stifflers. App. 18a. A Superseding Indictment was filed on November 17, 1999. It charged Shaw with (1) violating the NESHAP pertaining to asbestos in violation of *42 U.S.C. § 7413(c)(1)* and *18 U.S.C. § 2* (Count I); (2) engaging in a scheme to falsify, conceal, or cover up the presence of asbestos in violation of *18 U.S.C. § 1001(a)(1)* (Count II); (3) making a false statement in violation of *18 U.S.C. § 1001(a)(2)* (Count III); and (4) illegally disposing of asbestos in violation of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), *42 U.S.C. § 9603*, and *18 U.S.C. § 2* (Count IV). App. 18a-19a. After proceeding to trial, Shaw was ultimately convicted of Count 2 and acquitted on the other charges. App. 20a.

3. Post-trial Petitioner filed a motion to set aside the verdict based on lack of jurisdiction under 18 U.S.C. § 1001. The motion was denied. App. 20a. On appeal, Petitioner again asserted lack of jurisdiction, arguing that 42 U.S.C. § 7413(c) was the exclusive means for criminal prosecution under the Clean Air Act and thus he could not be convicted under 18 U.S.C. § 1001. App. 21a. Petitioner also claimed that he had no legal duty as he was neither an owner nor operator of the property as required under 40 C.F.R. § 61.145. App. 21a. The Tenth Circuit Court of Appeals affirmed Petitioner's conviction. The Court concluded that the government had discretion to proceed under either statute. The Court agreed with Petitioner that conviction under 18 U.S.C. § 1001 required a legal duty but concluded that a legal duty could arise by statute, regulation or form. App. 33a. The case was remanded for resentencing. App. 44a. However, sentencing issues are not part of this petition for writ of certiorari.